

BRB No. 10-0508

BERTRAND GARDINER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: 03/11/2011
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Compensation Order Award of Attorney Fees of David B. Groeneveld, District Director, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney Fees (Case No. 01-0167571) of District Director David B. Groeneveld rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Following the successful prosecution of the claim, claimant's counsel submitted a fee application for work performed before the district director between February 25, 2009 and March 3, 2010. Counsel requested \$2,864.25, representing 4 hours of legal services at the hourly rate of \$395, 4.5 hours of legal services at the hourly rate of \$100, 2.25 hours of legal services at the rate of \$80, 1.75 hours of legal services at the hourly rate of

\$285 and .50 hours of legal services at the hourly rate of \$110, plus \$100.50 in costs. Employer responded, objecting to the requested hourly rates.

In his award of an attorney's fee, the district director reduced the hourly rate requested to \$250 for work performed by attorneys from February 25, 2009 to December 8, 2009, to \$260 for attorneys and \$80 for paralegals for work performed from January 19, 2010 to February 28, 2010, and to \$270 for attorneys and \$85 for paralegals for work performed after March 1, 2010. The district director awarded in full the number of hours requested. Thus, the district director awarded claimant's counsel a fee in the amount of \$2,118.25.

On appeal, claimant contends that the district director erred in his determination of the applicable hourly rate, averring that the district director failed to address adequately the documentation presented to him. Employer responds, urging affirmance of the district director's award.

In support of his fee application, claimant's counsel submitted an affidavit regarding his experience as an attorney and his normal billing rate, affidavits from other attorneys in the same geographic location attesting to market hourly rates, and fee awards in other cases. Employer also submitted documentation concerning hourly rates in the relevant geographic location. The district director noted the parties' documentation, but stated he had previously determined that a reasonable hourly rate for services between February 25, 2009 and December 8, 2009, was \$250 for attorneys and \$77 for paralegals, and, for services provided between January 19, 2010 and February 28, 2010, was \$260 for attorneys and \$80 for paralegals. The district director also found that a reasonable hourly "market" rate for services performed between March 1, 2010 and March 3, 2010, was \$270 for attorneys and \$85 for paralegals. Order at 2. We cannot affirm the district director's hourly rate determinations as he did not state on what these findings are based.

The United States Supreme Court has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a "reasonable attorney's fee" under a federal fee-shifting statute, such as the Longshore Act.¹ See *Perdue v. Kenny A.*, 130

¹A "reasonable attorney's fee" is calculated in the same manner in all federal fee shifting statutes, including the Longshore Act. See *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227 n.8, 43 BRBS 67, 70 n.8(CRT) (4th Cir. 2009); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1054, 43 BRBS 6, 8-9(CRT) (9th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657, 662 (6th Cir. 2008); *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 159 (2009).

S.Ct. 1662 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum*, 465 U.S. at 895; see also *Kenny A.*, 130 S.Ct. at 1672. The burden falls on the fee applicant to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 1053, 43 BRBS 6, 8(CRT) (9th Cir. 2009);² see also *Westmoreland Coal Co. v. Cox*, 602 F.3d 276 (4th Cir. 2010); *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009); *B&G Mining, Inc. v. Director, OWCP*, 522 F.3d 657 (6th Cir. 2008); *Stanhope v. Electric Boat Corp.*, ___ BRBS ___, BRB No. 06-0924 (Dec. 20, 2010).

The parties presented to the district director documentation in support of their contentions concerning an applicable "market rate" in the relevant geographic community. The district director, however, started with the premise that an appropriate hourly rate for work performed in 2009 is \$250 and early in 2010 is \$260. These findings are not based on the parties' documentation or on any reasoning provided by the district director. For the period commencing March 1, 2010, the district director described the parties' documentation, but did not explain how any of it supports his finding that the appropriate market rate is \$270 as of March 1, 2010. Thus, we must remand the case for the district director to determine a reasonable hourly rate in the "relevant community," taking into account the evidence and arguments offered by the parties. See *H.S. [Sherman] v. Dept. of Army/NAF*, 43 BRBS 41 (2009). On remand, the district director must provide an explanation for his hourly rate determinations. While the district director may consider the rates awarded in recent cases arising under the Act as some "inferential evidence" of the prevailing market rates in the relevant community, prior fee awards are not necessarily dispositive of the hourly rate determination in a particular case. Rather, the district director also must consider the evidence submitted by the parties regarding prevailing market rates in the relevant community. See *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT); *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *B&G Mining, Inc.*, 522 F.3d 657; see generally *Patterson v. Balsamico*, 440 F.3d 104 (2^d Cir. 2006); *Farbotko v. Clinton County of New York*, 433 F.3d 204 (2^d Cir. 2005).

²In *Christensen*, the Ninth Circuit recognized that there is no private market for attorney's fees under the Longshore Act and thus it is necessary that counsel be awarded fees "commensurate with those which they could obtain by taking other types of cases." *Christensen*, 557 F.3d at 1053-1054, 43 BRBS at 8(CRT) (internal citations and quotations omitted); see also *Beckwith v. Horizon Lines, Inc.*, 43 BRBS 156, 157 (2009).

Accordingly, the district director's hourly rate determinations are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge